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No. 84-1561

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

S/S "LAKE ANJA", her engines, tackle, boilers, etc., EUROLAKES TANKER LINE, A/S BLYSTAD SHIPPING LINE, ARNE BLYSTAD, A/S OSLO, BLYSTAD SHIPPING INC., STANFORD BLYSTAD SHIPPING, INC., OSLO & A/S SONGA,

Petitioners,

—against—

M. GOLODETZ EXPORT CORPORATION and N.V. ALGEMENE VERZEKERINGSMIJ MERCATOR,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

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COMMENT ON PETITIONER'S STATEMENT OF THE CASE AND ARGUMENT

The Court of Appeals did not base its holding on *Schnell v. The Vallescura*, 293 U.S. 296 (1934). Rather, the Second Circuit held the ocean carrier liable for all of the cargo damage because petitioner did not prove it was entitled to a defense under Section 1304 (2) of the United States Carriage of Goods by Sea Act, 46 U.S.C. 1300 *et. seq.* The decision was based on *The Saturnia*, 226 F.2d 147 (2d Cir. 1955), which stands for the irrefutable principle that a common carrier has a continuing duty to care for cargo in its custody. The comment regarding

Schnell v. The Vallescura was only dictum. Thus, the petitioner raises a moot issue, at the wrong time and in the wrong place, and the attempt to obtain review on certiorari is merely an academic exercise. It is of no consequence to the legal basis for the decision below or the quantum of damages awarded.

The quarrel petitioner seems to have with the Court of Appeals has to do with its holding that the ocean carrier may not be absolved for damage resulting from the overheating of the cargo during the Rotterdam repair delay (A-16). Although the trial judge speculated that improper heating over the course of the expected voyage might not have resulted in damage to the tallow, the Court of Appeals put the issue in proper focus:

> We disagree, for the cases suggest that, in this setting, the delay cannot be said to be a cause that relieves the carrier of liability for the cargo damage that occurred during the delay. Accordingly, we reverse the district court's ruling that the carrier bears no COGSA liability for such damage. (A-15)
>
> * * *
>
> In light of *The Saturnia*, however, the appropriate question becomes whether proper heating over the course of the extended voyage would have caused the cargo to exceed its contractual specifications. Absent a finding in the affirmative, we must reverse the district court's determination that the carrier was absolved of liability for damage occurring during the delay. (A-16)

The petitioner mistakenly attempts to camouflage this holding as revolving around the question of the method of apportionment of liability by the trial judge. That is false! At that point of its decision, the Court of Appeals had not even mentioned *Schnell v. The Vallescura*. Rather, Judge Kaufman specifically based the ruling on *The Saturnia* and stated: "We might, on the basis of the foregoing discussion alone, reverse the district court's division of damages." (A-17) That is, since delay was not an excepted cause, the apportionment of the damage was not an issue.

Moreover, by sophistry petitioner seeks to give the impression that the ocean carrier was merely a victim of circumstance, an innocent bystander, if you will. The trial record belies this. In the first place, both the trial court and the Court of Appeals found the petitioner to be a willful, intentional wrongdoer. (A-14, A-11) Petitioner, with knowledge, deliberately violated the heating instructions which were in fact a custom in the trade. Secondly, petitioner's feigned plea of ignorance as to the chemistry of tallow is a sly ploy, both factually and legally. The petitioner had transported tallow for many years. The S/S Lake Anja was built in 1963 and was equipped precisely for the purpose of carrying tallow. As noted by Judge Kaufman, petitioner was an "experienced carrier knowing the nature of his cargo and aware of its special heating and cooling requirements..." (A-14)

Petitioner also desperately attempts to portray its position as a *cause celebre*, or a crusade in which it is the bellwether for worldwide ocean carriers. In actuality, this is a situation of failure of proof by the petitioner at the trial court level. Counsel for petitioner, who was also trial counsel and not merely a casual spectator, did not even argue at any stage of the district court proceedings that the cargo damage could or should be apportioned. Before the Court of Appeals, the petitioner failed to set forth any plausible evidentiary or legal formula to apportion the damage, whether on the basis of fault or extent of damage. Furthermore, petitioner offered no proof as to the relationship between heat and time and their effect on tallow. Were they directly proportional? Inversely proportional? Equal? Disparate? No one testified that such questions could not be answered. There was also no proof that without overheating the tallow would nevertheless have arrived damaged, or that the specific time period in question, i.e., the 19-day delay, would have alone caused damage. Petitioner, in essence, tries to use the lapses of the ocean carrier's trial counsel to contrive equity arguments in its favor.

For the record, there was no "battery of experts". Petitioner called one expert to testify, whom the trial judge did not believe.

The other witnesses for both sides were fact witnesses employed in the trade.

Finally, petitioner's references at page 7 to an "off the record" conference with the trial judge is a breach of conduct which should not go unnoticed. Respondents' counsel's recollection of the *in camera* conference is different. In any event, none of this is a part of the trial record. It is merely another gratuitous comment on the part of petitioner herein.

THE WRIT OF CERTIORARI SHOULD BE DENIED FOR THE FOLLOWING REASONS:

1. THE FATAL FLAW IS THAT THE QUESTION RAISED BY PETITIONER DOES NOT QUALIFY FOR REVIEW. THIS COURT RECENTLY DENIED CERTIORARI ON THE SAME ISSUE.

Petitioner's arguments raise no issue which could qualify for review under Rule 17.1 of this Court.

There is no conflict with any other circuit involved herein. In fact, the Second Circuit's analysis of the issue raised by petitioner is in accord with the other circuits with respect to allocation of damages in cargo cases. No federal question has been decided in conflict with a state court of last resort, and there has been no departure from the usual course of judicial proceedings.

Most significantly, this is not a situation where a Court of Appeals has decided an issue which is ripe for review by this Court or is in conflict with other decisions by this Court. In fact, the Second Circuit's analysis with respect to the issue raised by petitioner follows this Court's directives in *Schnell v. The Vallescura*. It is also the very same issue which this Court so recently refused to review in *Vana Trading Co., Inc. v. S/S Mette Skou*, 556 F.2d 100, *cert. denied*, 434 U.S. 892 (1977).

Furthermore, in view of the Court of Appeals' primary holding that in any event the ocean carrier was liable for all of the cargo damage because a COGSA exception was not

available, petitioner's argument is moot. The result below as to either liability or the quantum of damages would not be altered even if certiorari were granted, since the petitioner seeks review of dictum.

2. THE SECOND CIRCUIT CORRECTLY INTERPRETED *THE VALLESCURA RULE* – A RULE BASED ON SOUND POLICY CONSIDERATIONS WHICH HAS BEEN UNIFORMLY APPLIED BY THE OTHER CIRCUITS.

In any event, the Court of Appeals did not misread *Schnell v. The Vallescura* as is suggested by petitioner. Rather, the Second Circuit correctly explained the directives of this Court.

In *The Vallescura, supra*, 293 U.S. at 304, Justice Stone characterized a common carrier of goods by sea as follows:

> He is a bailee entrusted with the shipper's goods with respect to the care and safe delivery of which the law imposes upon him an extraordinary duty. All the facts and circumstances upon which he may rely to relieve him of that duty are peculiarly within his knowledge and usually unknown to the shipper. In consequence, the law casts upon him the burden of the loss which he cannot explain or, explaining, bring within the exceptional case in which he is relieved from liability.

Relying on such policy considerations this Court promulgated the durable and just rule that a common carrier must bear the entire loss unless he can prove what portion of the cargo damage is attributable to some cause for which it is not responsible:

> The vessel in the present case is in no better position because, upon the evidence, it appears that some of the damage, in an amount not ascertainable, is due to sea peril. That does not remove the burden of showing facts relieving it from liability. If it remains liable for the whole amount of the damage because it is unable to show that sea peril was a cause of the loss, it must equally remain so if it cannot show what part of the loss is due to that cause.

Schnell v. The Vallescura, 293 U.S. at 307.

As conceded by petitioner, this is the "long established common law rule." (p. 6) In dictum, the Second Circuit correctly interpreted this rule:

> Even if the collision delay were deemed a concurrent cause of the damage to the Golodetz cargo, the total absence of evidence to support an apportionment of damages requires us to reverse the district court's allocation formula. Simply put, the carrier must bear the entire loss. (A-18)

The rule as set forth herein is identical to the rule which has been applied historically in the Second Circuit, and in the other circuits, in the very limited number of cases in which the issue of apportionment of cargo damage has arisen.

As explained in *Vana Trading v. S/S Mette Skou*, 556 F. 2d 100, 104 & n.7 (2nd Cir. 1977) *cert. denied* 434 U.S. 892 (1977) there have been seven cases wherein *The Vallescura* rule, as applied herein, has been "restated and followed" in the Second Circuit since 1934. It has also been invariably followed in the other maritime circuits. *Daido Line v. Thomas P. Gonzales Corp.*, 299 F. 2d 669, 671 (9th Cir. 1962). *Tri-Valley Packing Ass'n v. States Marine Corp.*, 310 F. 2d 891, 893 (9th Cir. 1962), *The Oregon Mail*, 270 F.2d 499, 502 (9th Cir. 1959), *U.S.A. v. Apex Fish Co.*, 177 F. 2d 364, 368-369 (9th Cir. 1949), *U.S. v. Los Angeles Soap*, 83 F. 2d 875, 882 (9th Cir. 1936); *The Nelson Traveller*, 95 F. 2d 286 (9th Cir. 1938); *Northeast Petroleum v. Kyriakouw Shipping Co. Ltd.*, 478 F. Supp. 558, 563 (D.C. Mass. 1979), *The Quaker Oats Co. v. M/V Torvanger*, 734 F. 2d 238, 241 (5th Cir. 1984); *Blasser Bros. v. Northern Pan-American Line*, 628 F.2d 376, 382 (5th Cir. 1980). *Nitram v. Cretan Life*, 599 F. 2d 1359, 1373 (5th Cir. 1979), *Swedish American Lines v. Evans Products Co.*, 431 F. 2d 869, 870 (4th Cir. 1970). *PPG Industries v. Ashland Oil Co.*, 592 F. 2d 138, 144 (3rd Circuit 1978), *cert denied* 444 U.S. 830.

None of the circuits has deviated from *The Vallescura* rule when the issue of allocation of cargo damage has arisen in similar settings. In fact, the petitioner has failed to cite a single decision wherein a circuit court, in a situation analogous to the instant action, has either chosen not to adopt *The Vallescura* rule or has determined that it should be replaced by, or interpreted to include, an alternative doctrine such as proportionate fault.

Furthermore, a survey of the reported jurisprudence appears to indicate that in the course of the 50 years during which it has existed, the circuit courts have apparently had occasion to cite or follow *The Vallescura* rule in about 25 cases. In only 10 of these cases was the rule the deciding factor upon which the court held the carrier liable for all of the cargo damage. In the remaining cases it was merely discussed in dictum explaining the overall burdens of proof which the courts have universally applied in cargo cases.

Thus, the rule set forth in *Schnell v. The Vallescura* that the carrier has the burden of proof to segregate the cargo *damage* resulting from excepted and non-excepted causes is not only an equitable rule, it is also a norm which induces amicable resolution of cargo disputes. This is obviously true since the issue of apportionment of cargo damage has rarely reached the circuit courts. *The Vallescura* rule, as correctly interpreted herein by the Second Circuit, functions effectively, and as the old saying goes, "If it ain't broke, don't fix it."

3. THE INTERNATIONALLY FOLLOWED RULE OF *THE VALLESCURA* DOES NOT DISRUPT "UNIFORMITY" OF MARITIME LAW. PROPORTIONATE FAULT IS APPLIED ONLY IN NEGLIGENCE AREAS OF PERSONAL INJURY AND COLLISION. OTHER AREAS OF MARITIME LAW ARE NOT SO GOVERNED.

A cargo claim is not a negligence case. It is a contract case based on the terms of the contract of affreightment, or the bill

of lading, booking note, and other writings such as heating instructions, as modified by COGSA. Cargo claims litigation is intertwined with marine insurance contracts, liability insurance contracts of ocean carriers, and protection and indemnity policies of shipowners, charter parties and so on. Most carrier offenses are breaches of contract although certain defenses may involve considerations of due care. Herein, the offense of the petitioner was an intentional, willful breach of the contract of carriage.

Furthermore, in a cargo case, the roles of the parties are significantly different from the roles of the respective parties in collision cases and in personal injury cases, where both parties were actors who participated in the incident out of which the litigation arose, and both have access to the sources of proof.

A cargo situation, on the other hand, involves a bailment relationship. The shipper entrusts his cargo to the ocean carrier who has exclusive custody of it during the entire ocean voyage and extended transportation period. The plaintiff shipper or consignee is not present when the cause of action which gives rise to the cargo claim is initiated and does not have the same access to the sources of proof which are available to the ocean carrier. This is why *The Vallescura* the rule was created, and this is the reason all of the courts have through the years asserted that it is based on a "wise policy" which serves not only to hold carriers accountable for cargo damage, but to induce carriers to exercise utmost care in discharging the duty which is peculiarly within their control.

This is not a situation such as existed in *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397 (1975), wherein the collision damages rule in the United States was out of harmony with the other maritime nations. Rather, the essence of *The Vallescura* rule, as analyzed by the Second Circuit herein, is accepted and applied by courts of the major maritime nations, See Carver, *Carriage of Goods by Sea*, Vol. 1, Sec. 154, p. 132 (12th ed. 1971). It is also incorporated in the United Nations Convention on the Carriage of Goods by Sea ("Hamburg Rules")

promulgated in 1978, but not yet in force pending ratification by the requisite number of countries. Article 5.7 of the convention is as follows:

> 7. Where fault or neglect on the part of the carrier, his servants or agents combines with another cause to produce loss, damage or delay in delivery the carrier is liable only to the extent that the loss, damage or delay in delivery is attributable to such fault or neglect, *provided that the carrier proves the amount of loss, damage* or delay in delivery not attributable thereto. (emphasis added)

One commentator cited *The Vallescura* in evaluating this article of the convention as "incorporat[ing] U.S. case law, which requires the carrier to separate *damage* for which it is not liable from *damage* for which it is liable, or else, pay the entire damage." Chandler, *A Comparison of "COGSA", the Hague/Visby Rules, and the Hamburg Rules*, 15 Journal of Maritime Law & Commerce, 233, 243-245, (1984).

Petitioner's myopic contention that *The Vallescura* rule should only apply to pre-COGSA cases is without merit. *The Vallescura* was decided in 1934. The U.S. Carriage of Goods by Sea Act was enacted in 1936, after extensive committee hearings. Congress certainly must have known of the case and saw no reason to statutorily alter *The Vallescura* burdens of proof which, as conceded by petitioner, is based on a "long established common law rule." (p. 6)

Moreover, at the present time Congress is considering a draft of a bill which codifies *The Vallescura* burdens of proof. The Committee on Merchant Marine and Fisheries of the U.S. House of Representatives in a letter dated January 16, 1985, has circulated to all interested parties a proposed draft of a bill "To revise, consolidate and enact certain laws related to maritime liability as subtitles I and III of title 46, United States Code, 'Shipping'." The letter was circulated by the Honorable Walter B. Jones, Chairman of that committee. In Subchapter II - Duties and Liabilities, Section 30911, article (3) reads, as now drafted:

> (e) When loss, damage, or delay is because of the fault or neglect of a carrier or the carrier's agents or servants and another person, the carrier is liable only for the extent of the loss, damage, or delay attributable to the fault or negligence of the carrier or the carrier's agents or servants *if the carrier proves the amount of loss, damage, or delay attributable to the other.* (emphasis added)

While the language seems slightly askew it is clear the Committee intends to codify the gravamen of *The Vallescura* rule and of the *Hamburg Rules*. A proposal is now before the committee to enact the bill with the proviso it take full force and effect once the majority of the United States' trading partners by dollar amount adopt the *Hamburg Rules*.

Certainly, the worldwide trend is to accept the thrust of *The Vallescura* rule rather than abandon it as petitioner proposes. There is at present uniformity in the national and international maritime law as it relates to the allocation of liability when there are concurring causes of cargo damage. No purpose will be served by tampering unnecessarily with this worldwide legal harmony.

THE CONCLUSION

It is not clear whether the petitioner wants this court to somehow reinterpret *The Vallescura* rule to allow for division of cargo damages based on proportionate fault, or whether petitioner wants the court to replace the venerable *Vallescura* rule with such a formula. To take either step would be completely contrary to the norms applied by the circuit courts and tacitly adopted by this court when it denied certiorari in *Vana Trading Co. Inc. vs. S/S Mette Skou*. It would also be out of tune with the international maritime world which follows the spirit of the burdens of proof rule as enunciated by this court in *The Vallescura*.

In any event, this is not the case to consider the relief suggested by the petitioner and the petition for review on certiorari should be denied.

Respectfully submitted,

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